No. 85366-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRUCE CEDELL, a single man,

Plaintiff/Petitioner,

vs.

FARMERS INSURANCE COMPANY OF WASHINGTON,

Defendant/Respondent.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE BRIEF ON THE MERITS

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On Behalf of
Washington State Association for Justice Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. Both WSTLA and WSTLA Foundation name changes were effective January 1, 2009. WSAJ Foundation has an interest in the rights of persons seeking legal redress under the civil justice system, including an interest in the rights of insureds pursuing actions against their first-party insurers for the tort of insurance bad faith.[1]

II. INTRODUCTION AND STATEMENT OF THE CASE

This review involves an action by Bruce Cedell (Cedell) against Farmers Insurance Company of Washington (Farmers) for insurance bad faith and violation of the Consumer Protection Act, Ch. 19.86 RCW (CPA).[2] The gravamen of the action is that Farmers, as first-party insurer,

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[1] Pursuant to RAP 13.4(h), WSAJ Foundation previously filed an amicus curiae memorandum supporting review in this case.

[2] Generally, insurance bad faith involves unreasonable, unfounded or frivolous conduct by an insurer, or conduct that otherwise is not in good faith. See Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 560, 951 P.2d 1124 (1998); Mulcahy v. Farmers Ins. Co., 152 Wn.2d 92, 106, 95 P.3d 313 (2004). CPA liability often goes hand-in-hand with bad faith, particularly when liability is grounded in violation of insurance claims-handling regulations, Ch. 284-30 WAC. See Coventry v. American States Ins. Co., 136 Wn.2d 269, 279, 961 P.2d 933 (1998); Mulcahy, 152 Wn.2d at 106-07. In the first-party context, an insurer may avoid liability for bad faith if it denies coverage on a basis that is reasonably debatable, if it has otherwise acted non-negligently and in good faith. See Am. Best Foods, Inc. v. Alea London, 168 Wn.2d 398, 412-13 & n.5, 229 P.3d 683 (2010); Mulcahy, 152 Wn.2d at 106. (A different bad faith standard applies in the duty to defend context. See Alea, 168 Wn.2d at 413.)

mishandled a casualty claim resulting from a fire at Cedell's residence. The underlying facts are drawn from the Court of Appeals opinion, the parties' briefing and the superior court's discovery orders. See Cedell v. Farmers Ins. Co., 157 Wn.App. 267, 237 P.3d 309 (2010), *review granted*, 171 Wn.2d 1005 (2011); Cedell Pet. for Rev. at 3-9; Farmers Ans. to Pet. for Rev. at 1-5; Cedell Br. at 1-12; Farmers Br. at 3-14; CP 490-96 (3/2/09 Findings and Order); CP 497 (3/2/09 Order Re: In Camera Review of Claim File); CP 485-89 (2/26/09 letter opinion).

The Court of Appeals, Division II, granted discretionary review of two superior court orders regarding discovery of material in Farmers' claims file that was allegedly protected by the attorney-client privilege and/or work product rule. Initially, the superior court ordered in camera review of the claims file, without redactions, to determine whether Farmers properly invoked the attorney-client privilege and work product rule. See CP 490-96. The court based its order for in camera review on a determination that the facts "are adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the fraud exception set forth in *Escalante*[3] to the attorney-client privilege has occurred." CP 494 (finding #15).

Following in camera review, the superior court ordered Farmers to produce its entire claims file, without redactions, explaining the basis for

[3] The reference is to Escalante v. Sentry Insurance, 49 Wn.App. 375, 743 P.2d 832 (1987), *review denied*, 109 Wn.2d 1025 (1988), *overruled on other grounds by* Ellwein v. Hartford Accident & Indem. Co., 142 Wn.2d 766, 15 P.3d 640 (2001).

this order in a letter opinion. See CP 497 & 485-89.[4] The letter opinion discussed both the attorney-client privilege and the work product rule, concluding that neither applied under the circumstances. See CP 485-89.[5] In the course of its analysis, the court noted that Farmers' lawyer was actively involved in the claims-handling process, "with primary responsibility for communicating with the insured for several months before the insured retained counsel." CP 488.

Division II reversed. The court appears to have adopted the two-step civil fraud analysis established in Escalante. See Cedell at 276-77; Escalante, 49 Wn.App. at 394. However, the court determined that Cedell did not satisfy either step of the analysis. See Cedell at 278-79. The court first held that the superior court abused its discretion in conducting in camera review because the initial showing was inadequate. See id. at 278 (concluding "plaintiff must show fraud, as opposed to just bad faith"). It further held the superior court abused its discretion in ordering disclosure of the claims file because it was not supported by a foundation in fact for actual fraud (again, as opposed to bad faith). See id. at 273-79.

[4] The letter opinion was supposed to be attached to the court's order regarding in camera review. See CP 497. The briefing does not indicate whether the record includes the materials reviewed in camera by the superior court.

[5] In its discussion of the attorney-client privilege, the superior court referenced Escalante and the civil fraud exception. See CP 486. Farmers argues the superior court erroneously applied the civil fraud exception to conduct short of actual fraud. See Farmers Ans. To Pet. For Rev. at 16; Farmers Br. at 22. Farmers also argues that the superior court erroneously applied an automatic exception to the attorney-client privilege for first-party insurance bad faith. See Farmers Br. at 16; Farmers Reply Br. at 10. The Court of Appeals agreed. See Cedell, 157 Wn.App. at 276. The precise basis for the superior court's order is beyond the scope of this amicus curiae brief, and is for this Court to determine.

The Court of Appeals rejected Cedell's argument that the attorney-client privilege and work product rule do not apply in a first-party insurance bad faith context. In so ruling, the court cautioned that:

> an insurance company may not hire an attorney as a claims adjuster just to fall within the attorney[-]client privilege. A claims adjuster's conduct is not privileged simply because the claims adjuster happens to be a lawyer. Accordingly, only information, investigation, and advice [lawyer] Hall gave Farmers *in his capacity as an attorney* is subject to the privilege.

157 Wn.App. at 275-76 (emphasis added). The court did not otherwise address the role that Farmers' lawyer played in the claims-handling process, nor its bearing on the privilege and work product analyses.

This Court granted Cedell's petition for review.

III. ISSUES PRESENTED

1. Does Washington's "civil fraud" exception to the attorney-client privilege and work product rule apply in the first-party insurance bad faith context, when the insurer and its lawyer mishandle the insured's claim, even though their conduct does not rise to the level of actual fraud?

2. Alternately, should this Court hold that the attorney-client privilege and work product protection do not apply to an insured's claim against his first-party insurer for insurance bad faith, up until the point the insurer denies coverage or ceases attempts to resolve the claim?

IV. SUMMARY OF ARGUMENT

Re: "Civil Fraud" Exception

This Court should uphold Escalante and apply the civil fraud exception to the attorney-client privilege and work product rule based upon insurance bad faith conduct by the insurer and its lawyer in the claims-handling process. For policy reasons unique to first-party insurance, such misconduct should be considered tantamount to fraud.

The Court of Appeals below misinterpreted the civil fraud exception, as articulated in Escalante, by failing to apply the two-step analysis to wrongful conduct short of actual fraud by Farmers and its lawyer. In so doing, the court overlooked the impact of Farmers' lawyer's dual function in the claims-handling process, as both lawyer and claims adjuster.

Re: Proposed "Bright-Line" Rule

For the same policy reasons that warrant application of the "civil fraud" exception to a first-party insurer for bad faith conduct not amounting to actual fraud, this Court should permit discovery of the insurer's claims file up to the point the insurer denies coverage or ceases attempts to resolve the claim, without regard to the attorney-client privilege and work product rule. While in Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985), the Court eschewed such a bright-line rule for certain work product in the third-party context, this first-party context requires a different analysis because the insured's and insurer's interests ought to be aligned at the outset of the processing of a claim.

V. ARGUMENT

A. Overview Regarding Assertion Of The Attorney-Client Privilege And Work Product Rule In Opposition To Civil Discovery.

Parties may obtain discovery regarding any matter that is relevant to the subject matter involved in a pending action. See CR 26(b)(1).[6] Relevance for purposes of discovery is much broader than it is for

[6] The current version of CR 26 is reproduced in the Appendix to this brief.

purposes of admissibility at trial under ER 401-02, encompassing all information that is potentially relevant. See Barfield v. Seattle, 100 Wn.2d 878, 886, 676 P.2d 438 (1984). Potential relevance is assessed with respect to the subject matter of the pending action, as distinguished from the specific issues raised by the pleadings. See Bushman v. New Holland Div. of Sperry Rand Corp., 83 Wn.2d 429, 434, 518 P.2d 1078 (1974). It is not grounds for objection that the information sought will be inadmissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence. See CR 26(b)(1). The scope of discovery is deliberately broad in order to aid in pretrial preparation, see Barfield, 100 Wn.2d at 886; reduce the possibility of unfair surprise at trial, see Bushman, 83 Wn.2d at 434; and give the parties sufficient information to evaluate the prospects for settlement before trial, see Lurus v. Bristol Labs., Inc., 89 Wn.2d 632, 636, 574 P.2d 391 (1978).

The scope of discovery may be limited "[u]pon motion by a party or by the person from whom discovery is sought," and the court may enter a protective order "for good cause shown." CR 26(c). Limitations include the attorney-client privilege and information prepared in anticipation of litigation, known as work product. See CR 26(b)(1), (4) & (5).

1. Attorney-Client Privilege. The law of privilege is incorporated into the discovery rules by express reference in CR 26(b)(1). See Coburn v. Seda, 101 Wn.2d 270, 274, 677 P.2d 173 (1984); see also ER 501(a); ER 1101(b). The attorney-client privilege protects confidential

communications between attorney and client. See RCW 5.60.060(2)(a).[7] Although it is phrased in terms of a restriction on the ability to examine the attorney about such communications, it also precludes examination of the client. See Seattle Nw. Securities Corp. v. SDG Holding Co., 61 Wn.App. 725, 735-36, 812 P.2d 488 (1991). The privilege extends to documents containing attorney-client communications. See Kammerer v. Western Gear Corp., 96 Wn.2d 416, 421, 635 P.2d 708 (1981).

The purpose of the attorney-client privilege is to "encourage[] the client to disclose damaging or embarrassing information that might not otherwise be revealed so that the attorney may help the client." State v. Maxon, 110 Wn.2d 564, 573, 756 P.2d 1297 (1988). However, because the privilege "sometimes results in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege cannot be treated as absolute; rather, it must be strictly limited to the purpose for which it exists." Pappas v. Hollaway, 114 Wn.2d 198, 203-04, 787 P.2d 30 (1990).

The party resisting discovery on grounds of the attorney-client privilege has the burden of proving that the privilege applies. See Dietz v. Doe, 131 Wn.2d 835, 844, 935 P.2d 611 (1997). To satisfy this burden, the party asserting the privilege must first establish the existence of an attorney-client relationship. See id., 131 Wn.2d at 843-44. An attorney-client relationship does not necessarily arise when a lawyer is hired to

[7] The current version of RCW 5.60.060(2) is reproduced in the Appendix to this brief.

perform a non-legal function. See Morgan v. Federal Way, 166 Wn.2d 747, 755-56, 213 P.3d 596 (2009) (holding no attorney-client relationship exists when attorney was hired to perform an investigation pursuant to an employer's antidiscrimination and antiharassment policy).[8]

Assuming an attorney-client relationship exists, the party asserting the privilege must establish that the communications were made in the lawyer's legal capacity; that is, that they involve legal advice. See Kammerer, 96 Wn.2d at 421 (holding privilege inapplicable under the facts to corporate memorandum analyzing business strategy based in part on lawyers' advice); Dreiling v. Jain, 151 Wn.2d 900, 918, 93 P.3d 861 (2004) (holding privilege inapplicable to report of corporate board's "special litigation committee," even though produced by lawyer); Cedell, 157 Wn.App. at 275-76 (noting insurance adjuster's conduct is not privileged simply because the adjuster happens to be a lawyer). When an attorney-client relationship exists, but the attorney also acts in some other capacity, even if simultaneously, communications in the non-legal capacity may not be privileged. See Williams v. Blumenthal, 27 Wash. 24, 29-30, 67 Pac. 393 (1901) (holding privilege inapplicable to client's communication with attorney authorizing attorney to execute accord and satisfaction as client's agent); see also State v. Dorman, 30 Wn.App. 351, 359, 633 P.2d 1340 (1981) (discussing examples of communications falling outside of lawyer's legal capacity).

[8] Morgan involved the Public Records Act, Ch. 42.56 RCW, which exempts records that would not be subject to pretrial discovery, essentially incorporating the attorney-client privilege and work product rule. See 166 Wn.2d at 754.

Even with respect to legal advice, the privilege may be waived implicitly. An implicit waiver may be found as a matter of fairness where the otherwise protected information is placed at issue in the case. See Pappas, 114 Wn.2d at 207-08 (adopting Hearn v. Rhay, 68 F.R.D. 574, 581 (E.D. Wash. 1975), test for implicit waiver).

There is an exception to the attorney client privilege for civil fraud and other misconduct tantamount to civil fraud. See Whetstone v. Olson, 46 Wn.App. 308, 313, 732 P.2d 159 (1986) (improper coaching of a witness); Escalante, 49 Wn.App. at 394 (insurance bad faith). The exception is not grounded in the precise nature of the misconduct in question, and whether it involves the classic nine-element formulation of actual fraud or some other type of misconduct. Instead, it reflects a balance under the particular circumstances of society's interest in the free and open communication between attorney and client, which the privilege promotes, against society's interest in the administration of justice based on full disclosure of the facts, which the privilege discourages. See Dike v. Dike, 75 Wn.2d 1, 14, 448 P.2d 490 (1968).

2. **Work Product.** Protection for work product is generally traced to the U.S. Supreme Court's decision in Hickman v. Taylor, 329 U.S. 495 (1947), although it is now codified in the civil discovery rules. See CR 26(b)(4)-(5) & Appendix. The work product rule protects documents prepared by lawyers and others in anticipation of litigation,

basically "permitting attorneys to work with a certain degree of privacy and plan strategy without undue interference." Coburn, 101 Wn.2d at 274.

Material prepared in the regular course of business, even when prepared by a lawyer, is not considered work product. See Morgan, 166 Wn.2d at 754-55 (holding report prepared by attorney hired to perform an investigation pursuant to an employer's antidiscrimination and antiharassment policy is not work product); see also Heidebrink, 104 Wn.2d at 399-400 (adopting case-by-case approach for determining whether specific documents prepared by an insurer are work product in the third-party context because "an insurance company's ordinary course of business entails litigation," and "it is not hard to imagine insurers mechanically forming their practices so as to make all documents appear to be prepared in 'anticipation of litigation'").

If the material sought in discovery was prepared in anticipation of litigation, then the burden shifts to the party seeking discovery to show substantial need for the information, including a showing that it is not available elsewhere without undue hardship. See CR 26(b)(4).[9] As with the attorney-client privilege, there also appears to be an exception to the work product rule for civil fraud. See Soter v. Cowles Publishing Co., 131 Wn.App. 882, 895, 130 P.3d 840 (2006) (recognizing but not applying exception), *aff'd*, 162 Wn.2d 716, 174 P.3d 60 (2007).

[9] For example, in Escalante, 49 Wn.App. at 396 n.11, the Court of Appeals noted the nature of the issues in an insurance bad faith action "automatically establishes substantial need for discovery of certain materials in an insurer's claims files."

B. Overview Regarding The Attorney-Client Privilege And Work Product Rule In The Insurance Bad Faith Context.

This case involves a first-party insurer invoking the attorney-client privilege and work product rule to prevent production of its claims file, under circumstances where the insurer's lawyer is visibly involved in the claims-handling process. When an attorney is involved in the claims-handling process, courts and commentators have taken different approaches regarding application of the attorney-client privilege and work product rule in insurance bad faith actions. Underlying these different approaches is a concern that non-disclosure of ostensibly privileged or work product material may conceal wrongdoing and thereby promote improper claims handling, resulting in crucial evidence of bad faith being unavailable to the insured.

Some courts have deemed a lawyer to be acting outside of his or her legal capacity when performing claims-handling functions. See James C. Nielsen, Advice of Counsel in Insurance Bad Faith Litigation, 25 Tort & Ins. Law J. 533, 549-51 (1990); see also Mission Nat. Ins. Co. v. Lilly, 112 F.R.D. 160, 163 (D. Minn. 1986) (magistrate opinion holding privilege and work product rule inapplicable where law firm acting as claims adjusters; emphasizing "[i]t would not be fair to allow the insurer's decision in this regard to create a blanket obstruction to discovery of its claims investigation").[10] This is consistent with Washington law regarding

[10] But see Dunn v. State Farm Fire & Cas. Co., 927 F.2d 869, 875 (5th Cir. 1991) (holding investigative tasks performed by insurer's outside counsel privileged because

the unprivileged status of non-legal work performed by a lawyer, as recognized by the Court of Appeals below. See Cedell at 275-76.[11]

Other courts have found an implicit waiver of the attorney-client privilege. See Steven Plitt, The Elastic Contours of Attorney-Client Privilege and Waiver in the Context of Insurance Company Bad Faith, 34 Seton Hall L. Rev. 513, 546-68 (2004) (criticizing implicit waiver analysis from insurer perspective). Where an insurer makes factual assertions in defense of a bad faith claim that implicitly incorporate the advice of counsel, as a matter of fairness the court will find waiver so that the insured can uncover and test the foundation for those assertions. See Tackett v. State Farm Fire & Cas. Ins. Co., 653 A.2d 254, 259-60 (Del. 1995) (finding implicit waiver of attorney-client privilege based on the insurer's assertion that UIM claim was "handled routinely"); id. at 261-63 (finding substantial need for disclosure of work product on same basis); State Farm Mut. Auto. Ins. Co. v. Lee, 13 P.3d 1169, 1183 (Ariz. 2000) (finding implicit waiver of attorney-client privilege based on insurer's assertion that its adjusters reasonably denied UIM stacking based in part on investigation of law). This analysis is consistent with Washington law regarding implicit waiver of the attorney-client privilege. Compare Lee,

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they were related to the rendition of legal services and work product because they were performed in anticipation of litigation).

[11] In this regard, it should be noted that the claims-handling process is subject to extensive regulation by the Insurance Commissioner, whether performed by a lawyer or non-lawyer. See WAC 284-30-310 (scope of regulation); WAC 284-30-330 (specific unfair claims settlement practices); WAC 284-30-350 (misrepresentation of policy provisions); WAC 284-30-360 (standards for the insurer to acknowledge pertinent communications); WAC 284-30-370 (standards for prompt investigation of claims); WAC 284-30-380 (settlement standards applicable to all insurers).

13 P.3d at 1174 (applying Hearn test for implicit waiver), with Pappas, 114 Wn.2d at 207-08 (same).

Other courts have compelled disclosure of communications between an insurer and its lawyer on grounds of the civil fraud exception to the attorney-client privilege and work product rule. See United Services Auto. Ass'n v. Werley, 526 P.2d 28, 33 (Alaska 1974) (finding exception applicable in UIM context because "[w]hen an insurer through its attorney engages in a bad faith attempt to defeat, or at least reduce, the rightful claim of its insured, invocation of the attorney-client privilege for communications pertaining to such bad faith dealing seems clearly inappropriate"). This is the approach taken in Escalante, 49 Wn. App. at 394 (following Werley). See infra § C.

Still other courts have decided as a matter of policy that the attorney-client privilege and work product rule do not apply on a per se basis to communications between an attorney involved in the claims-handling process and the insurer in the first-party context, up to the point that the insured's claim is denied. See Cassandra Feeney, Note, Are You "In Good Hands"? Balancing Protection for Insurers and Insured in First-Party Bad-Faith Claims With a Uniform Standard, 45 N. Eng. L. Rev. 685, 712-13 (2011); see also Boone v. Vanliner Ins. Co., 744 N.E.2d 154, 158 (Ohio) (holding "claims file materials that show an insurer's lack of good faith in denying coverage are unworthy of protection"), *cert. denied*, 534 U.S. 1014 (2001); Garg v. State Auto. Mut. Ins. Co., 800 N.E.2d 757, 761

(Ohio App. 2003) (applying Boone to work product), *review denied*, 805 N.E.2d 540 (Ohio 2004); Unklesbay v. Fenwick, 855 N.E.2d 516, 520 (Ohio App. 2006) (extending Boone to forms of bad faith other than denial of coverage).[12] This approach would appear to be novel in Washington, although it is consistent with the quasi-fiduciary nature of the relationship between a first-party insurer and insured. See Tank v. State Farm Fire & Cas. Co., 105 Wn.2d 381, 385-86, 715 P.2d 1133 (1986); cf. Seattle Nw., 61 Wn. App. at 737 (noting authority that fiduciary may not assert attorney-client privilege under certain circumstances). See infra § D.

Although any of the foregoing approaches may arguably apply to the fact pattern presented by this case, the issues have been framed by the parties in terms of the civil fraud exception and the policy-based rule requiring disclosure.

C. The *Escalante* Formulation Of The Civil Fraud Exception, Including Its Two-Step Analysis, Should Be Upheld, With The Exception Encompassing Insurance Bad Faith By A First-Party Insurer And Its Lawyer.

Division II's opinion in Escalante sets forth the proper test for determining when the civil fraud exception should be applied to overcome a first-party insurer's assertion of the attorney-client privilege or work product rule. In Escalante, Division III of the Court of Appeals applied the civil fraud exception to insurance bad faith actions. See 49 Wn.App. at 393-94. Relying on out-of-state authorities it found persuasive, the court

[12] The Ohio legislature subsequently modified the Boone rule to require a prima facie showing of insurance bad faith, fraud, or criminal misconduct. See Ohio Rev. Code Ann. § 2317.02(A)(2).

adopted a two-step analysis for evaluating whether documents sought in discovery must be produced under the exception. The initial inquiry is whether the party seeking discovery has made a factual showing "'adequate to support a good faith belief by a reasonable person that wrongful conduct sufficient to invoke the ... fraud exception ... has occurred.'" Id. at 394 (quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)).[13]

If the superior court finds an adequate showing then, under the second step, it may conduct an in camera inspection of the relevant documents to determine whether there is a "foundation in fact" for the alleged wrongful conduct. See Escalante at 394; see also Seattle Nw., 61 Wn.App. at 740-41 & n.3 (noting that upon a preliminary showing, the court should order in camera review); VersusLaw, Inc. v. Stoel Rives, LLP, 127 Wn.App. 309, 331 & n.27, 111 P.3d 866 (2005) (holding court must conduct in camera review to determine whether exception applies), *review denied*, 156 Wn.2d 1008 (2006).

Escalante concludes that insurance bad faith is tantamount to civil fraud. See 49 Wn.App. at 394. In so doing, it relies on the Alaska Supreme Court's decision in Werley, supra. See Escalante at 394. Werley involved

[13] Both Division I and Division II have recognized and applied this type of threshold test for determining whether there exists a sufficient showing of wrongful conduct to justify in camera review to determine whether the civil fraud exception applies, albeit not in an insurance bad faith context. See Seattle Nw., 61 Wn.App. at 740-41 & n.3 (Division I, adopting Escalante threshold test for determining availability of civil fraud exception in bad faith dealings litigation); Whetstone, 46 Wn.App. at 311-12 (Division II, upholding trial court dismissal of sexual harassment claim for refusal to turn over document for in camera inspection, finding sufficient basis for threshold showing).

insurance claims mishandling, and the court had little difficulty extending the civil fraud exception to insurance bad faith situations:

> When an insurer *through its attorney* engages in a bad faith attempt to defeat, or at least reduce, the rightful claim of its insured, invocation of the attorney-client privilege for communications pertaining to such bad faith dealing seems clearly inappropriate. We thus find that the tortious activity alleged by Werley satisfies the 'civil fraud' requirement of the exception to the attorney-client privilege.

526 P.2d at 33 (emphasis added; footnote omitted).[14] Similar to Werley, Cedell alleges wrongful conduct involving the insurer's lawyer, although here based on direct involvement in the claims-handling process, a non-lawyerly function. See supra § B.

Division III, citing Escalante, has recognized that there is a "'bad faith' exception" in this litigation context. See Soter, 131 Wn.App. at 895.[15] Another Division III case, Barry v. USAA, 98 Wn.App. 199, 989 P.2d 1172 (1999), also addresses application of the civil fraud exception in a bad faith litigation context. While Barry recognized the Escalante two-step process for determining whether the exception applied, it found that the superior court did not abuse its discretion in refusing to conduct an in camera review of the relevant documents because the particular factual showing was found wanting. See Barry, 98 Wn.App. at 206-07. Farmers suggests that Barry supports the view that the fraud exception does not encompass insurance bad faith. See Farmers Br. at 22. However, this

[14] Some insurance industry commentators recognize that Werley and Escalante apply the civil fraud exception to wrongful conduct constituting insurance bad faith. See M. Elizabeth Medaglia, Privilege, Work Product, and Discovery Issues in Bad Faith Litigation, 32 Tort & Ins. L.J. 1, 9-10 & n.40 (1996); Nielsen, supra at 546-49; Plitt, supra at 530-33.

[15] On further review, this Court did not comment upon or otherwise address the Court of Appeals' reference to a bad faith exception. See Soter, 162 Wn.2d at 744.

reading of Barry is at odds with the Court of Appeals opinions in Escalante, Soter, and Seattle Nw., supra. Instead, Barry is better understood as a fact-specific application of the two-step process established in Escalante. To the extent it holds otherwise, Barry should be disapproved.

The civil fraud exception should apply equally to the work product rule in this insurance bad faith context. As noted in Caldwell:

> the work product privilege is also subject to the crime or fraud exception. Just as the attorney-client privilege may not be abused as a shield for ongoing or future illegal activity, so the privilege created for an attorney's work product cannot be allowed to protect the perpetuation of wrongful conduct.

644 P.2d at 34 (citations omitted); see also Soter, 162 Wn.2d at 744 (noting that opinion work product may be discoverable in circumstances such as fraud exception).

The Court of Appeals' opinion below misreads Escalante regarding the civil fraud exception in two aspects. First, it limits the civil fraud exception to fraudulent conduct. See Cedell, 157 Wn.App. at 278. Second, it basically requires proof of fraud at the first step of the analysis, which is problematic at the discovery stage of proceedings, when relevant information is often in the exclusive possession of the insurer. It also seems to render the second step superfluous.

This Court should approve the two-step process articulated in Escalante for determining applicability of the civil fraud exception to the attorney-client privilege and work product rule. A demonstrated

"foundation in fact" for a first-party insurer's lawyer's involvement in bad faith conduct should trigger the exception.

There are compelling reasons for applying the exception in this context, without requiring fraudulent conduct. There is a strong public interest in the business of insurance. See RCW 48.01.030. Insurance policies, unlike traditional contracts, "abound with public policy considerations." See Oregon Auto. Ins. Co. v. Salzberg, 85 Wn.2d 372, 376, 535 P.2d 816 (1975). Violations of the Insurance Code, Title 48 RCW, or the Insurance Commissioner's claims-handling regulations implicate the public interest and are not purely matters of private concern.[16] Moreover, first-party insurers have quasi-fiduciary obligations to their insureds, and must give equal consideration to their insureds in all matters. See Tank, 105 Wn.2d at 385-86; Farmers Br. at 16 n.3.

D. The Court Should Adopt A Bright-Line Rule Permitting An Insured To Discover A First-Party Insurer's Claims File Up To The Point The Insurer Denies Coverage Or Ceases Attempts To Resolve The Claim, Without Regard To The Attorney-Client Privilege Or Work Product Rule.

Cedell asks the Court to adopt a bright-line rule allowing insureds to discover claims files in insurance bad faith litigation, including material generated or received by a lawyer involved in the claims-handling process.

[16] See RCW 19.86.093(1)-(2) (describing per se public interest impact under CPA); RCW 19.86.170 (providing violations of Insurance Code or regulations subject to CPA); RCW 19.86.920 (declaring purpose of CPA to protect the public); RCW 48.01.030 (declaring public interest in insurance); RCW 48.30.010(1)-(2) (providing violations of Insurance Code or regulations constitute unfair trade practices); RCW 48.30.015 (providing remedy for unreasonable denial of coverage or payment, and violations of regulations); see generally Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 920-23, 792 P.2d 520 (1990).

See Cedell Pet. For Rev. at 1-2 & 10-13. This is an open question in Washington.

In Heidebrink, the Court resisted adopting a similar approach to certain work product in the third-party insurance context. See 104 Wn.2d at 394-401. However, the first-party context involved in this case is materially different. Here, the interests of insurer and insured ought to be aligned at the outset of the claims-handling process. See Feeney, supra at 711-12. As noted above, because first-party insurers are quasi-fiduciaries, they are required to give their insureds equal consideration in *all* matters, which must include fair treatment in the claims-handling process. See Tank, 105 Wn.2d at 385-86. Moreover, the insurer's claims file is the predominant, if not the sole, source of information bearing on a bad faith claim. See Escalante, 49 Wn.App. at 396 n.11.

Consequently, the Court should adopt the view developed in a series of Ohio decisions permitting discovery of claims files in first-party insurance bad faith litigation up to the point when coverage is denied or the insurer ceases attempts to resolve the claim, without regard to the attorney-client privilege or work product rule. See Boone, 744 N.E.2d at 758-59; Garg, 800 N.E.2d at 761; Unklesbay, 855 N.E.2d at 521. To the extent these benchmarks are subject to legitimate dispute, the trial court may resolve the matter by in camera review. See Unklesbay at 522-23 (concluding insurer request for in camera review should have been granted).

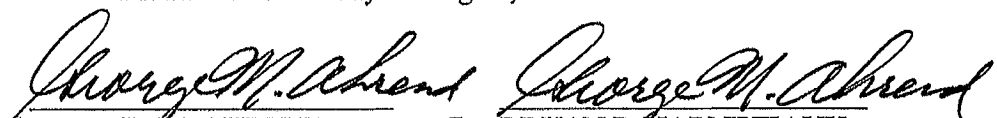
Any other approach implicitly assumes, contrary to the quasi-fiduciary nature of the relationship, that the interests of the insured and insurer are adverse from the moment that a claim arises. Furthermore, application of the privilege and work product rule to a lawyer involved in the claims-handling process would only serve to mask bad faith conduct and prevent insureds from holding insurers accountable for such conduct.

Potential criticism that this approach will lead to abuse or an increase in claims for insurance bad faith should be rejected. These claims are still subject to the requirements of CR 11, and in doubtful cases trial courts can exercise their discretion to conduct in camera review to test the bona fides of the claim. See Freehe v. Freehe, 81 Wn.2d 183, 188-89, 500 P.2d 771 (1972) (rejecting argument that abolition of inter-spousal immunity would flood the courts with cases; expressing confidence in judicial process to weed out non-meritorious claims), *overruled on other grounds by* Brown v. Brown, 100 Wn.2d 729, 675 P.2d 1207 (1984).

VI. CONCLUSION

The Court should consider the authorities and legal analysis set forth in this brief in resolving the issues on review.

DATED this 23rd day of August, 2011.



GEORGE M. AHREND FOR BRYAN P. HARNETIAUX, WITH AUTHORITY

On behalf of WSAJ Foundation

Appendix

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) *Insurance Agreements.* A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Structured Settlements and Awards.* In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) *Trial Preparation: Materials.* Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be

discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) *Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(7) *Discovery From Treating Health Care Providers.* The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(8) *Treaties or Conventions.* If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party

may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

(f) Discovery Conference. At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

(g) Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

(h) Use of Discovery Materials. A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

(i) Motions; Conference of Counsel Required. The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or

obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

(j) Access to Discovery Materials Under RCW 4.24.

(1) *In General.* For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) *Motion.* The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

(3) *Decision.* The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995; January 12, 2010.]

RCW 5.60.060. Who are disqualified--Privileged communications

. . . .

(2)(a) An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.

(b) A parent or guardian of a minor child arrested on a criminal charge may not be examined as to a communication between the child and his or her attorney if the communication was made in the presence of the parent or guardian. This privilege does not extend to communications made prior to the arrest.

. . . .

[2009 c 424 § 1, eff. July 26, 2009; 2008 c 6 § 402, eff. June 12, 2008; 2007 c 472 § 1, eff. July 22, 2007. Prior: 2006 c 259 § 2, eff. June 7, 2006; 2006 c 202 § 1, eff. June 7, 2006; 2006 c 30 § 1, eff. June 7, 2006; 2005 c 504 § 705, eff. July 1, 2005; 2001 c 286 § 2; 1998 c 72 § 1; 1997 c 338 § 1; 1996 c 156 § 1; 1995 c 240 § 1; 1989 c 271 § 301; prior: 1989 c 10 § 1; 1987 c 439 § 11; 1987 c 212 § 1501; 1986 c 305 § 101; 1982 c 56 § 1; 1979 ex.s. c 215 § 2; 1965 c 13 § 7; Code 1881 § 392; 1879 p 118 § 1; 1877 p 86 § 394; 1873 p 107 § 385; 1869 p 104 § 387; 1854 p 187 § 294; RRS § 1214. Cf. 1886 p 73 § 1.]

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Subject: Cedell v. Farmers Ins. Co. (S.C. #85366-5) - Amicus Curiae Brief on Merits

Dear Mr. Carpenter:

Attached is an amicus curiae brief on behalf of the Washington State Association for Justice Foundation. I understand that the Foundation's request to file an amicus curiae brief has previously been granted.
Electronic service is being made on the parties per prior arrangement.

Respectfully submitted,

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